No. 492

In the Supreme Court of the United States

OCTOBER TERM, 1960

CIVIL AERONAUTICS BOARD, PETITIONER

v.

DELTA AIR LINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD

ARCHIBALD COX,
Solicitor General,
LEE LOEVINGER,
Assistant Attorney General,
RICHARD A. SOLOMON,
IRWIN A. SEIBEL,
Attorneys,
Department of Justice, Washington 25, D.C.

JOHN H. WANNER,
General Counsel,
O. D. CLEMENT,
Associate General Counsel,
MORRIS CHERTKOV,
Attorney,
Civil Aeronautics Board, Washington 25, D.C.

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OPINION BELOW

The opinion of the court of appeals (R. 98–107) is reported at 280 F. 2d 43.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1960 (R. 107). The petition for a writ of certiorari, filed on October 19, 1960, was granted on December 12, 1960 (364 U.S. 917; R. 108). The jurisdiction of this Court is invoked under 49 U.S.C. 1486(f) and 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Civil Aeronautics Board, once it has entered an order permitting a certificate of public

convenience and necessity to become effective, is without power thereafter, in the same proceeding, to modify the certificate in response to a timely petition for reconsideration filed prior to the effective date of the certificate.

STATUTE AND REGULATIONS INVOLVED

Sections 401 (f) and (g) of the Federal Aviation Act (72 Stat. 755–756, 49 U.S.C. 1371 (f) and (g)) provide:

> EFFECTIVE DATE AND DURATION OF CERTIFICATE
>
> (f) Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided, or until the Board shall certify that operation thereunder has ceased, or, if issued for a limited period of time under subsection (d)(2) of this section, shall continue in effect until the expiration thereof, unless, prior to the date of expiration, such certificate shall be suspended or revoked as provided herein, or the Board shall certify that operations thereunder have ceased: *Provided,* That if any service authorized by a certificate is not inaugurated within such period, not less than ninety days after the date of the authorization as shall be fixed by the Board, or if, for a period of ninety days or such other period as may be designated by the Board any such service is not operated, the Board may by order, entered after notice and hearing, direct that such certificate shall thereupon cease to be effective to the extent of such service.

AUTHORITY TO MODIFY, SUSPEND, OR REVOKE

(g) The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate.

Section 302.37 of the Rules of Practice of the Civil Aeronautics Board, 14 C.F.R. 302.37 (1956 Rev. ed.), provides:[1]

§ 302.37 *Petition for reconsideration*—(a) *Time for filing.* A petition for reconsideration, rehearing or reargument may be filed by any party to a proceeding within thirty (30) days after the date of service of a final order by the Board in such proceeding unless the

[1] The rule was amended on February 14, 1959, in respects not here relevant. See note 7, p. 13, *infra.*

time is shortened or enlarged by the Board, except that such petition may not be filed with respect to an initial decision which has become final through failure to file exceptions thereto. However, neither the filing nor the granting of such a petition shall operate as a stay of such final order unless specifically so ordered by the Board. After the expiration of the period for filing a petition, a motion for leave to file such petition may be filed; but no such motion shall be granted except on a showing of unusual and exceptional circumstances, constituting good cause for failure to make timely filing. Within ten (10) days after a petition for reconsideration, rehearing, or reargument is filed, any party to the proceeding may file an answer in support of or in opposition to the petition.

(b) *Contents of petition.*—A petition for reconsideration, rehearing, or reargument shall state, briefly and specifically, the matters of record alleged to have been erroneously decided, and the ground relied upon, and the relief sought. If the petition is based, in whole or in part, on allegations as to the consequences which would result from the Board's order, the basis of such allegations shall be set forth. If the petition is based, in whole or in part, on new matter, such new matter shall be set forth, accompanied by a statement to the effect that petitioner, with due diligence, could not have known or discovered such new matter prior to the date the case was submitted for decision.

(c) *Successive petitions.*—A successive petition for rehearing, reargument, or reconsidera-

tion filed by the same party or parties, and upon substantially the same ground as a former petition which has been considered or denied by the Board, will not be entertained.

STATEMENT

The present controversy arises out of the so-called *Great Lakes-Southeast Service* case, a proceeding in which the Civil Aeronautics Board considered the long-haul service needs of an area extending roughly between the Great Lakes and Florida and the applications of numerous trunkline carriers seeking to serve these needs. In order to keep the administrative proceedings within manageable bounds, the Board declined to consolidate a number of applications which had been filed by various carriers to provide new and improved short-haul service between certain intermediate cities in the area. (R. 5). Instead, it directed the institution of a separate proceeding (*Great Lakes Local Service Investigation*, Docket No. 4251) on those applications. In order to insure that the separation of the two proceedings would not deprive the existing local-service carriers of their rights under *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327, and to give those carriers an opportunity to show the effect of a grant upon their existing operations, the Board permitted the local carriers to intervene in the long-haul proceeding (R. 5–6).

The Board's decision in the long-haul proceeding (R. 11–53) made a number of awards, including one permitting the respondent, Delta Air Lines (Delta),

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(1) to extend an existing route northwest so as to provide service from Detroit to Miami and (2) to add Indianapolis and Louisville as intermediate points on its existing Chicago-to-Miami route. Although the Board imposed certain restrictions on a number of the new awards (including the authorization to Delta, R. 51) so as to protect local service carriers,[2] it did not impose such restrictions with respect to a number of intermediate points on the long-haul routes Delta was authorized to serve.

The Board's decision and order in the long-haul *Great Lakes-Southeast Service* case was issued on September 30, 1958 (R. 11), and provided that the certificates issued pursuant thereto were to become effective on November 29, 1958, unless postponed by the Board prior to that date (R. 56). Within the thirty days then prescribed by the Board rules (see § 302.37 of the Board Rules of Practice, 14 C.F.R. 302.37, 1956 Rev. ed., *supra*, pp. 3–5), Lake Central Airlines and Piedmont Aviation, local carriers which had been permitted to intervene in the long-haul proceeding to protect their interests (R. 3, 5–6), filed timely petitions for reconsideration. These petitions sought to impose on Delta's service to some ten pairs of cities[3] a requirement that service to those points

[2] These restrictions normally preclude so-called "turnaround" service between two points by requiring that service between these points be only on a flight originated or terminated in some distant city. (See, *e.g.*, R. 51).

[3] The ten pairs of cities in issue were: Indianapolis-Chicago; Indianapolis-Louisville; Indianapolis-Cincinnati; Indianapolis-Lexington; Indianapolis-Asheville; Dayton-Lexington; Dayton-Asheville; Cincinnati-Louisville; Louisville-Lexington; and Louisville-Asheville.

originate or terminate at some distant city (R. 88–93). Lake Central also asked that the effective date of Delta's certificate be stayed pending a Board decision on the petitions for reconsideration (*id.* at 92–93).

On November 28, 1958, one day prior to the proposed effective date of the certificates, the Board issued a lengthy memorandum and order (E–13211, R. 57–80) in response to numerous requests for stay which had been filed in connection with sixteen petitions for reconsideration addressed to its September 30 decision (R. 57–58, note 1). With one exception,[4] these stays were denied, the Board concluding that "the parties have not made a sufficient showing of probable legal error or abuse of discretion in our decision" and that in view of the advent of the peak winter season the "new services to Florida are immediately required", a consideration which the Board felt "clearly weights the scale * * * in favor of a denial of the requested stay" (R. 58–59). But the Board made clear that "because of the detailed matters raised in the petitions for reconsideration, it will not be possible to finally dispose of them until after November 29" (R. 58). It stated further that denial of the stays "is in no way prejudicial to the legal rights of those parties seeking reconsideration. Nothing in the present order forecloses the Board from full and complete consideration of the pending peti-

[4] The exception was with respect to a certificate awarded to Eastern Air Lines. This certificate was stayed because of the serious questions raised by the petition for reconsideration and, also, "because of a strike * * * Eastern in any event is presently unable to inaugurate service * * *" (R. 78).

tions for reconsideration on their merits" (R. 80).[5]

On May 7, 1959, the Board issued an order (E-13835) disposing of the petitions on their merits (R. 81–87). This order, which gives rise to the present controversy, granted the petitions of Lake Central and Piedmont and imposed restrictions on Delta's certificate which preclude operations between the ten designated pairs of cities unless the flights originate or terminate at Atlanta or a point south thereof (*id.* at 83–84, 87). In imposing these restrictions, the Board noted that "[i]f, after deciding the issues presented in *Great Lakes Local Service Case*, we conclude that the long-haul restrictions are not required, we will have full freedom to remove them at that time" (*id.* at 83).

The court of appeals reversed, holding that the Board, once it permits a certificate to become effective, is thereafter without power, in the same proceeding, to add restrictions to the certificate, even in response to a timely petition for reconsideration filed prior to the effective date of the certificate (R. 98–107). The court assumed that Delta was "on notice" that the Board might "modify the certificate on the basis of matters set forth in the filed petitions for reconsideration" (*id.* at 106), stating that its "holding is not based upon the fact that, prior to the date

[5] The awards actually became effective on December 5, 1958, because of a temporary stay granted by the Board (R. 94–95) to enable the court of appeals to consider a stay request addressed to it by Eastern Air Lines in its unsuccessful efforts to challenge the basic awards in the proceeding. See *Eastern Air Lines* v. *Civil Aeronautics Board*, 271 F. 2d 752 (C.A. 2), certiorari denied, 362 U.S. 970.

the certificate was modified, Delta inaugurated service authorized by the certificate" (*ibid.*).[6] Its view was that Sections 401 (f) and (g) of the Federal Aviation Act require the conclusion that, in the absence of fraud, misrepresentation or clerical error, a certificate which the Board has permitted to become effective can thereafter be modified only in a new proceeding satisfying the requirements of Section 401(g) (*ibid.*).

SUMMARY OF ARGUMENT

The changes in a certificate of public convenience and necessity to which the procedures prescribed in Section 401(g) apply are those occasioned by conditions arising *after* completion of the proceeding in which the certificate was issued. The section has no application until the decision-making process in the original certification proceeding has come to an end. And the event which "marks the end of that proceeding * * *" is when the certificate is "finally granted and the time fixed for rehearing it has passed * * *." *United States* v. *Seatrain Lines,* 329 U.S. 424, 432. Section 401(f), like Section 401(g), implicitly assumes that the proceeding in which the certificate has been issued has come to an end, and therefore its provision that a certificate "shall continue in effect until suspended or revoked as hereinafter provided" does not preclude the Board from acting upon a timely petition for reconsideration where it permits the certificate to become effective pending rehearing.

[6] On January 1, 1959, Delta had inaugurated a local flight including service between Chicago and Indianapolis, one of the ten pairs of cities to which the Lake Central and Piedmont petitions for reconsideration had been directed (R. 101).

Both in the civil aeronautics field and in numerous related areas, the courts have concluded that the decision-making process remains alive while a timely petition for reconsideration is pending and that therefore the administrative agency retains authority to change its initial order during that period. Accordingly, the Board's power was not cut off by permitting respondent's certificate to become effective while timely petitions for reconsideration were pending in order to allow needed services to be provided immediately.

An operation which is permitted to go forward while petitions for reconsideration of the grant are pending may be deemed temporary or conditional, *i.e.*, subject to defeasance to the extent that elements of the grant are involved in the rehearing procedures. It is immaterial that Delta did not apply for temporary authority as such, since it proceeded with full knowledge that the certification was not in all respects final. We stress that Delta resisted a stay of the effective date of the certificate so that it might earn revenues during the pendency of the applications for reconsideration and that the Board gave explicit notice that the denial of stay would not foreclose "full and complete consideration of the pending petitions." Respondent "cannot blow hot and cold and take now a position contrary to that taken in the proceedings it invoked to obtain the [Board's] approval," *Callanan Road Co.* v. *United States*, 345 U.S. 507, 513.

As a result of the decision below, as the court of appeals acknowledges, "the Board's dilemma is real."

(R. 106.) The Board either must make unduly hasty decisions on requests for reconsideration raising complex problems or it must postpone the effective dates of certificates—a course which deprives the public of needed services and the carrier of revenues. The cases upon which the court below relied are clearly inapposite since all of them related to the question whether an agency may reopen a closed proceeding and modify an outstanding certificate long after disposition of any petition for reconsideration which may have been filed. Those cases, in short, were within the class to which the provisions of Section 401(g) clearly apply. They cast no doubt upon the distinction between a case in which a modification is sought after the administrative process has been completed and one in which the grant is still the subject of consideration in the initial proceeding as the result of a timely and proper invocation of ordinary rehearing procedures.

ARGUMENT

THE BOARD'S AUTHORITY TO ACT ON TIMELY PETITIONS FOR RECONSIDERATION OF AN ORDER GRANTING A CERTIFICATE IS NOT TERMINATED BECAUSE IT PERMITS THE CERTIFICATE TO BECOME EFFECTIVE WHILE THE PETITIONS ARE PENDING

The court below held that, once the Delta certificate had been allowed to become effective, the Board lost power to act upon pending petitions for reconsideration of the basic Board order granting the certificate. This conclusion was not based on any determination that the result was compelled either as a matter of

due process or fairness to Delta. Indeed, the court assumed that Delta was adequately put on notice, as of the time the Board made the certificate effective, that this action was without prejudice to any action which might subsequently be taken on the pending petitions. Nor did the court believe that its holding was essential, or even advantageous, to the proper performance of the Board's functions; on the contrary, it frankly acknowledged that the "dilemma" in which its decision placed the Board was "real" (R. 106). The court's rationale is that the result is dictated by Section 401(f) of the Federal Aviation Act, 49 U.S.C. 1371(f), which states that "[e]ach certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided * * *." This language it construed to mean that no effective certificate could be changed in any manner, except after further notice and hearing in accordance with the provisions of Section 401(g) of the Act, 49 U.S.C. 1371(g).

We shall urge that this restrictive interpretation is not required by the statute or by the relevant decisions. In our view, a Board order remains subject to modification or rescission in response to a timely petition for reconsideration, without regard to whether the Board has authorized the commencement of operations. This is so, we believe, because the provisions of the Act requiring the institution of formal new proceedings to amend or modify certificates may reasonably be read as applicable to closed proceedings

rather than to the situation presented here, where rehearing procedures had not been completed.

A. We note, at the outset, that no question has been raised as to the Board's authority to adopt Section 302.37 of its Rules of Practice (14 C.F.R. 302.37 (1956 Rev. ed.))[7] governing reconsideration. Although the Federal Aviation Act, unlike various other federal statutes establishing regulatory commissions, does not expressly provide for reconsideration of Board orders, "[t]he power to reconsider is inherent in the power to decide." *Albertson* v. *Federal Communications Commission,* 182 F. 2d 397, 399 (C.A.D.C.). The Board's power also derives from Sections 204(a), 1001, and 1005(d) of the Federal Aviation Act, 49 U.S.C. 1324(a), 1481 and 1485(d).[8] See *American Trucking Assns.* v. *Frisco Co.,* 358 U.S. 133, 145.[9]

[7] By a recent revision of the rules, the time within which a petition for reconsideration in a certification ("economic") proceeding may be filed, without special order of the Board, has been reduced from thirty to twenty days. See 14 C.F.R. 302.37 (1960 Supp.).

[8] Section 204(a) empowers the Board to "perform such acts, * * * and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out the provisions" thereof. Section 1001 authorizes the Board "subject to the provisions of this Act and the Administrative Procedure Act", to conduct its proceedings "in such manner as will be conducive to the proper dispatch of business and to the ends of justice." Section 1005(d) provides that "[e]xcept as otherwise provided in this Act, * * * the Board is empowered to suspend or modify [its] orders upon such notice and in such manner as [it] shall deem proper."

[9] The provisions of Section 1006(e) of the Act, 49 U.S.C. 1486(e), precluding judicial review of any objection to a

Nor is it contended that the Board rule governing reconsideration, providing for the filing of a petition within thirty days of the issuance of the order (a period well within the sixty days upon which certificates are ordinarily made effective), was in any respect improper. The question is solely whether Section 401(f) of the Act precludes the Board from acting on such a petition if it has not done so before the effective date specified in the certificate.

The court of appeals believed that Section 401(f) has this limiting consequence because it provides that a certificate, once effective, is to "continue in effect until suspended or revoked as hereinafter provided * * *." The defect of this view is that it ignores the fact that Section 401(f), in setting out the circumstances under which an effective certificate may be altered [10] or terminated, obviously contem-

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Board order not first "urged before the Board" would appear to require a petition for reconsideration as a prerequisite to obtaining court review of matters not fairly in issue during the agency proceeding. Compare *Levers* v. *Anderson*, 326 U.S. 219, with *Peoria Braumeister Co.* v. *Yellowley*, 123 F. 2d 637 (C.A. 7).

[10] It should be noted that Section 401(f) does not, in terms, purport to govern the specific situation presented by this case of a minor amendment to a much more comprehensive certificate. It provides only that a certificate "shall continue in effect" until suspended or revoked "as hereinafter provided" (or until the Board certifies that operations have ceased). Nothing is said about the terms of operation under the certificate, and specifically there is no reference to the Board's authority to alter, amend or modify the certificate once it becomes effective. Thus, even if the court of appeals' interpretation of the section was otherwise correct, it need not be read as if it provided that a certificate shall "continue in effect *without change* until *altered*, *amended*, *modified*, suspended or revoked as hereinafter provided."

plates the situation which prevails after the underlying Board proceeding has been finally concluded. The question when the Board's decision becomes final is not answered simply by referring to the date that the carrier is permitted to commence operations. Thus, it is clear that a certificate, effective in the sense that carrier operation thereunder would be legal, would nonetheless be terminated, without going through the procedures specified in Section 401(g) of the Act, if the Board order making the award were set aside upon judicial review. The situation is essentially the same with respect to reconsideration pursuant to a valid Board rule. See *Federal Communications Commission* v. *National Broadcasting Co.*, 319 U.S. 239, 245.

This is not to say that the Board has unlimited powers to keep a proceeding alive through the exercise of its rule-making authority, or that Section 401(f) of the Act is without function beyond specifying the date on which a certificate first becomes effective. Obviously, the Board has a duty to dispose of petitions for reconsideration within a reasonable time. Also, Section 401(f) may well preclude entertaining an out-of-time petition for reconsideration filed after a certificate has gone into effect. For present purposes, it suffices to say that when a certificate becomes effective at a time when one or more valid petitions for reconsideration are already pending, it does no violence to the letter or spirit [11] of Section 401(f) to

[11] It would appear that Delta received, in substance, all of the protection afforded by Section 401(g), even assuming the court of appeals' view of the law to be correct. For "notice"

recognize that the certificate is subject to defeasance in whole or part should the petition for reconsideration be granted. We submit that, at the least, this should be the rule where, as here, the Board, in permitting the certificate to become operative, has expressly conditioned its approval upon the outcome of the pending petitions for reconsideration.

The question whether Section 401(g) should be read as applicable only to certificate changes which take place after the initial licensing proceeding has been fully completed must be resolved, as indicated above, by a consideration of the logic and sense of the statute. In this process, one must give weight to the presumption that Congress was fully aware of the normal incidents of the administrative process, including the precept that the power to decide includes the power to reconsider. Legislative history, however, is of little aid in this case. There was no specific reference to the question now before the Court when Congress considered the Federal Aviation Act of 1958, the predecessor Civil Aeronautics Act of 1938, or the Motor Carrier Act of 1935, on which the Civil Aeronautics Act was patterned. However, this

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of the proposed modification of the certificate was provided by the petitions for reconsideration, as well as by the Board's express reservation, in its order denying a stay, of its "power to modify the certificate on the basis of the matters set forth in the filed petitions for reconsideration" (R. 106). And any "hearings" relevant to the issue had already been had since reconsideration was sought on the basis of the record already made (R. 88–93). Thus, even if the Board action on reconsideration were deemed a modification requiring proceedings in compliance with Section 401(g), there was compliance with the requirements of that section in everything but name.

much may be said. Sections 401 (g) and (h) of the Civil Aeronautics Act (which are identical to Sections 401 (f) and (g) of the Federal Aviation Act) were modeled after Section 212(a) of the Motor Carrier Act of 1935, 49 Stat. 555.[12] Section 212(a) of the latter statute was certainly not designed to preclude the modification of an effective certificate in response to a timely petition for reconsideration. Indeed, the original Motor Carrier Act, having provided in Section 212(a) that certificates shall be "effective from the date specified therein" and "remain in effect until terminated as herein provided," contained another provision (Section 204(e), 49 Stat. 547) which declared that the Commission may reconsider any "decision, order, or requirement," that an application for reconsideration shall not constitute a stay of the Commission's action, and that on rehearing the Commission might reverse, change, or modify its "original decision, order, or requirement." Thus, there was no question that the Interstate Commerce Commission was empowered to modify an effective certificate award in response to a timely petition for reconsideration. See *Denver-Chicago Trucking Co. Common Carrier Application*, 27 M.C.C. 343, 345.[13] There is no

[12] It appears clearly that Section 401 (g) and (h) of the Civil Aeronautics Act were taken directly from Section 212(a) of the Motor Carrier Act of 1935. See Confidential Committee Print, May 1, 1937, on S. 2, 75th Cong., 1st Sess., pp. 42–43.

[13] Although the Civil Aeronautics Act did not have special statutory provisions dealing with applications for reconsideration, it is scarcely to be doubted that the power to reconsider is inherent and does not require specific authorization. See *supra*, p. 13.

indication that Congress, in enacting the Civil Aeronautics Act or any other licensing statute, has proposed to do otherwise.

B. The case law which bears on the subject is completely consistent with the view that procedures of the kind prescribed in Section 401(g) of the Act were not intended to come into play until the "certificate [has been] finally granted and the time fixed for rehearing it has passed." *United States* v. *Seatrain Lines*, 329 U.S. 424, 432. The precise question appears to have been raised in only one previous case involving the Board, *Frontier Airlines, Inc.* v. *Civil Aeronautics Board*, 259 F. 2d 808 (C.A.D.C.). There, a contention was made that the Board's order on reconsideration, which included an amendment to an effective award, was "a nullity because it was rendered * * * after the certificate previously issued had become effective" (*id.* at 810). But the court of appeals rejected the argument without discussion. In *Western Airlines, Inc.* v. *Civil Aeronautics Board*, 194 F. 2d 211, 214 (C.A. 9), a similar result was reached where the problem was whether the Board could impose conditions upon a certificate transfer, in response to a timely petition for reconsideration, notwithstanding the fact that the transfer had already become effective.[14]

[14] The Board has previously modified, upon reconsideration, certificates which it had allowed to become effective. See *e.g.*, *North Central Case*, 8 C.A.B. 208 (1947); *Cincinnati-New York Additional Service*, 8 C.A.B. 603 (1947); *United-Western, Acquisition of Air Carrier Property*, 11 C.A.B. 701 (1950); *Service to Phoenix Case*, Order E–12039 (1957); *South Central Area Local Service Case*, Order E–14219 (1959). The

In a number of cases, a question has been raised as to whether the time for filing an appeal runs from the Board's original order or its order on reconsideration. In these instances, the courts of appeals have recognized that the order on reconsideration is but another step in the decision-making process in the original proceeding and that until that order is entered the Board has the continuing power to modify its original order. *Outland* v. *Civil Aeronautics Board,* 284 F. 2d 224, 226–228 (C.A.D.C.); *Waterman Steamship Corp.* v. *Civil Aeronautics Board,* 159 F. 2d 828, 829 (C.A. 5), reversed on other grounds, 333 U.S. 103; *Braniff Airways* v. *Civil Aeronautics Board,* 147 F. 2d 152, 153 (C.A.D.C.) But cf. *Consolidated Flowers Shipments* v. *Civil Aeronautics Board,* 205 F. 2d 449 (C.A. 9). "Where a motion for rehearing is in fact filed there is no final action until the rehearing is denied" because, as the court stated in the *Outland* case, "there is always a possibility that the order complained of will be modified in a way which renders judicial review unnecessary" (284 F. 2d at 227). In the *Waterman* decision, the filing of a

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"grave doubt as to its statutory power to do so" (R. 105) said to have been expressed by the Board in *Kansas City-Memphis-Florida Case,* 9 C.A.B. 401, was a doubt shared by only three members of the Board and did not serve as the basis for their decision, since the initial award was affirmed on its merits. Moreover, the question was as to the power to revoke, not the power to add restrictions of the kind here involved, a distinction which might have been considered significant in view of the different standards which have to be met for revocation, as contrasted with amendment, under Section 401(g). In later cases, as noted above, the Board has ordered modifications.

petition for reconsideration was held to have "operated to retain the Board's authority over the order" (159 F. 2d at 829).[15]

The courts have reached similar decisions in the communications field in which, as here, there are statutory provisions[16] requiring a new hearing preliminary to revocation or modification of license. *Black River Valley Broadcasts* v. *McNinch*, 101 F. 2d 235 (C.A.D.C.); *Albertson* v. *Federal Communications Commission*, 182 F. 2d 397, 399 (C.A.D.C.); *Enterprise Company* v. *Federal Communications Commission*, 231 F. 2d 708 (C.A.D.C.), certiorari denied, *sub nom. Beaumont Broadcasting Corp.* v. *Enterprise Company et al.*, 351 U.S. 920; *W. S. Butterfield Theatres* v. *Federal Communications Commission*, 237 F. 2d 552 (C.A.D.C.). In the *Black River* case, the court held that a radio construction permit could be withdrawn upon reconsideration of the application, notwithstanding the fact that the licensee had virtually completed construction following the effective date of the permit. This was held to be so because, until the agency acted on the petition for rehearing, "there was no *final* grant of a permit or license to plaintiff [and]

[15] The decision below would create a problem with respect to judicial review of Board orders. For, if the effectiveness of the certificate controls whether the Board can act on a petition for reconsideration, a party to a Board proceeding wishing to seek court review of the order will either have to forego a petition for reconsideration altogether (but see note 9, *supra*, p. 13), or, with the approach of either the date upon which the certificate would normally become effective or the date by which a petition for review of the original Board order would have to be filed, will be required to file a "protective" review petition to avoid the possibility of losing its appeal rights.

[16] See 47 U.S.C. 312, 316.

it went forward with its project at its peril". (101 F. 2d at 242; emphasis added.)[17]

The Interstate Commerce Commission cases relied on by the court of appeals—*United States* v. *Seatrain Lines*, 329 U.S. 424; *United States* v. *Watson Bros. Transportation Co.*, 350 U.S. 927, affirming 132 F. Supp. 905 (D. Neb.); *American Trucking Assns.* v. *Frisco Co.*, 358 U.S. 133, and *Smith Bros., Revocation of Certificate*, 33 M.C.C. 465—are nowise inconsistent with our view of the statutory scheme. All of these cases relate to the question whether an administrative agency may reopen a closed proceeding to modify or revoke an outstanding certificate long after disposition of any petition for reconsideration that may have been filed. In the *Seatrain* case, for example, the Commission sought to modify a certificate a year and a half after the certificate had been finally granted and the time fixed for rehearing had passed. In the *Watson* case, the period was four years after the proceeding had terminated. These were cases which involved "the reopening" of a closed proceeding. *American Trucking Assns.* v. *Frisco Co.*, *supra*, 358 U.S. at 146. If anything, these decisions lend some support to the position which we urge here, for they indicate that even in such circumstances there are occasions when a new proceeding is not required. See, *e.g.*, *American Trucking Assns.* v. *Frisco*, *supra* (correction of inadvertent ministerial errors).[18]

[17] See, also, *Fuller-Topance Truck Co.* v. *Public Service Commission*, 96 P. 2d 722, 724–725 (S. Ct. Utah); *Hazard-Hyden Bus Co.* v. *Black*, 293 Ky. 379 (Ct. App.), 169 S.W. 2d 21.

[18] The *Smith Bros.* case, *supra*, was also one in which the certificate had long been in effect; the question was whether

C. The fact that the Board ordinarily is able to dispose of petitions for reconsideration before the effective date of a certificate, as the court below noted (R. 105–106), is scarcely an indication of a lack of power to modify a certificate on reconsideration where it has been unable to resolve the question before that date. Nor does it suffice to say, as does Delta, that the decision below need not result in unduly hasty decisions since "the [Board] can always write a longer grace period * * * into a new certificate when it is granted" or, if the period proves to be inadequate, "all the Board has to do * * * is to extend the effective date of new certificates until it finishes its job of reconsideration" (Br. in Op. 22). This procedure may be useful in some circumstances. But it is not an answer where, as in the situation faced by the Board in this case, there is a pressing need for the inauguration of the newly authorized services. Had the Board postponed the effective dates of the certificates until May 7, 1959, when the reconsideration requests were decided, the peak Florida winter season travel would have been lost to the three newly certificated carriers (including Delta) whose direct Detroit-Florida grant was in no way affected by the later reconsideration.[19]

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such certificate could be revoked by the device of a self-executing forfeiture provision contained in the certificate.

[19] The fact that the Board did extend the effective date of Eastern's certificate (Br. in Op. 23) is of no help to Delta if for no other reason than that one ground for the Board's action was the inability of Eastern (because of a strike) to inaugurate service (R. 78).

Having been permitted to inaugurate the newly authorized service in time for the peak winter traffic and having itself *resisted* efforts by others to defer the start of this service (see *Eastern Air Lines* v. *Civil Aeronautics Board,* 261 F. 2d 830 (C.A. 2)), Delta is scarcely in a position to argue now that an additional delay to permit reconsideration would not have been "crucial" (Br. in Op. 23). Moreover, it is the responsibility of the Board to pass judgment upon the need for immediate service.

Nor is there merit to Delta's contention that the Board "can stay only a portion of a new award, if it desires to put uncontested portions into effect while giving more thought to those parts concerning which reconsideration has been sought." (*Ibid.*) For, apart from the practical administrative problems such a procedure would entail in a complex proceeding like the instant one, there are frequently no portions of an award which are uncontested. And even where some parts of an order are not challenged on reconsideration, the Board may well conclude that contested portions should be permitted to become effective pending resolution of reconsideration requests which, on a preliminary examination, do not appear likely to be granted.

As a matter of fact, Delta itself has recognized that a new proceeding is not always required to modify an effective certificate. (Delta's Reply to Reply of Petitioner in No. 493, dated December 1, 1960, pp. 3–5.) Delta acknowledges that, in connection with its own petition for reconsideration, it urged that its certificate could be modified, notwithstanding the fact

that it had already become effective. Its explanation for this apparent inconsistency is that its petition requested the Board to *add* authority (through the removal of a restriction), whereas the Board sought to withdraw authority (through the imposition of a restriction). No such distinction, however, can be justified either by any policy considerations of which we are aware or by the language of Section 401(g) which, when applicable, requires a new proceeding, to "alter, amend, modify, or suspend any such certificate * * *," regardless of the nature of the modification.

Recognizing the dilemma which its decision created for the Board, the court below suggested (R. 106, n. 12) that the Board might, for the future, "investigate the possibility of issuing some form of temporary authorization." But temporary authorization was in substance all that Delta received at the time its certificate became effective, since it was expressly made subject to such changes as a "full and complete consideration of the pending petitions for reconsideration" might warrant (R. 80). Perhaps the court of appeals was reluctant to view the matter in this light because it thought that the temporary certificates expressly provided for by Section 401(d) of the Act, 49 U.S.C. 1371(d), can only be granted upon "application"

[20] That section reads as follows:

(1) The Board shall issue a certificate authorizing the whole of any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public

therefor.[20] But this is not an obstacle. Taking into account (a) that Delta opposed a stay of authorization as sought by the applicants for reconsideration and (b) that it proceeded to operate with full notice that the Board, which had not yet completed the proceeding, proposed to do so, we submit that it must be taken to have acquiesced in the conditions which were implicitly attached to the Board's approval. See *Callanan Road Co.* v. *United States*, 345 U.S. 507, holding that a transferee of a water carrier permit, having invoked the power of the Interstate Commerce Commission to approve the transfer of an amended permit to it, could not thereafter challenge the procedures by which the Commission had amended the permit while it was in the transferor's hands. Cf. *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, 435, holding that the Interstate Commerce Commission, in approving the acquisition of two motor carriers by a railroad affiliate, could reserve the power to impose future limitations upon the certificates in order to insure that the activities of the new subsidiaries would remain auxiliary and supplemental to rail operations, without offending a statutory pro-

convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder.

vision stating that a certificate shall remain in effect until suspended or terminated.

Since the court of appeals refused to consider the authorization in this case as one inherently limited, albeit Delta was unmistakably aware of the Board's declared purpose to reserve final decision on the matters presented for its reconsideration, it is difficult to see how the court's invitation to consider other possibilities leaves the Board any appreciable room for improvisation. The only satisfactory answer to the practical problem, we believe, is that the Board, like similar agencies performing licensing functions, should be deemed empowered to adopt and implement ordinary rehearing procedures. If Section 401(g) is viewed, as we think it should be, as a provision addressed only to modifications, suspensions and revocations *subsequent* to the completion of the initial licensing proceeding, the Board will be able to proceed in customary and orderly fashion.

CONCLUSION

The judgment below should be reversed and the cause remanded with instructions to dismiss the petition for review.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
LEE LOEVINGER,
Assistant Attorney General.
RICHARD A. SOLOMON,
IRWIN A. SEIBEL,
Attorneys.

JOHN H. WANNER,
General Counsel.
O. D. OZMENT,
Associate General Counsel,
MORRIS CHERTKOV,
Attorney,
Civil Aeronautics Board.

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